

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF RAYNA G.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
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IN RE INTEREST OF RAYNA G., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLANT,

V.

DAVID S., APPELLEE.

Filed March 30, 2010. No. A-09-801.

Appeal from the Separate Juvenile Court of Lancaster County: LINDA S. PORTER, Judge.
Affirmed.

Gary Lacey, Lancaster County Attorney, Alicia B. Henderson, and Michelle Clarke,
Senior Certified Law Student, for appellant.

Sarah Sujith for appellant.

Jonathan Braaten, of Anderson, Creager & Wittstruck, P.C., for appellee.

Mariclare Thomas, guardian ad litem.

CARLSON and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

The separate juvenile court of Lancaster County entered an order which denied the State's request to terminate David S.' parental rights to his daughter, Rayna G. The State appeals the order, and we affirm.

BACKGROUND

Rayna was born in August 2006. David is Rayna's natural father. Rayna's mother, Amanda G., has relinquished her parental rights to Rayna.

On April 3, 2009, the State filed a petition to adjudicate Rayna as a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) with respect to David, a motion to terminate David's parental rights to Rayna, and a motion requesting that the court find that reasonable efforts to preserve and reunify the family were not required. The State alleged that (1) David had substantially and continuously or repeatedly neglected Rayna and refused to give Rayna necessary parental care and protection; (2) Rayna was a child within the meaning of § 43-247(3)(a) and reasonable efforts under the direction of the court have failed to correct the conditions leading to that determination; (3) David was unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which is seriously detrimental to Rayna's health, morals, or well-being; (4) David had subjected Rayna to aggravated circumstances, including abandonment; and (5) David had abandoned Rayna for 6 months or more immediately prior to the filing of the motion to terminate. Later during the hearing, the State moved to dismiss the second allegation in the termination motion alleging that Rayna was a child within the meaning of § 43-247(3)(a) and reasonable efforts under the direction of the court have failed to correct the conditions leading to that determination.

David entered his denial to the allegations in the petition on May 4, 2009. The hearing on the petition and motions was held in the juvenile court on July 9, 10, and 16, 2009. David, Amanda, and the Nebraska Department of Health and Human Services (DHHS) caseworker assigned to Rayna's case all testified. The court received exhibits including, inter alia, evidence of David's criminal history, protection orders entered against David, his failure to pay child support ordered for another child, letters exchanged between David and Amanda, and the results of drug and alcohol tests administered by DHHS between April 20 and July 1, 2009.

David testified that he first contacted DHHS to inquire as to Rayna in January 2009 because he had learned that she was no longer living with Amanda. David acknowledged that he has a substantial history of criminal convictions and incarcerations, domestic violence, protection orders entered against him, alcohol and drug use, and an unstable employment history. He testified that until early 2009, when he learned that Rayna was out of Amanda's home, he felt that Amanda was doing well and was a good mother, and he was not ready to change his lifestyle.

When David contacted DHHS, he requested visitation with Rayna and expressed interest in her permanent placement with him. David testified that he is working to turn his life around and is willing to do whatever the court asks of him if he is able to get financial assistance to comply with the court's orders. David has not been incarcerated since September 2008, and he has been sober since February 2009. David also testified that he has sought help with domestic violence counseling and attends Alcoholics Anonymous meetings at least twice per week.

The DHHS caseworker assigned to Rayna's case testified that Rayna has lived outside of Amanda's home since August 11, 2008, and has been living with Rayna's grandmother since that time. According to the caseworker, DHHS made no effort to contact David with respect to Rayna and had no contact with David until David contacted DHHS in January 2009. After David contacted DHHS, the caseworker arranged for David to undergo random urine analysis tests for drugs two to three times per week and for alcohol twice per week. The testing began April 20 and continued through July 1; all results were negative. The caseworker did not observe David to be under the influence of drugs or alcohol at any time during her contact with David. The

caseworker acknowledged that David had not refused to do anything that DHHS asked him to do.

In an order entered on July 28, 2009, the juvenile court found that the State had proved the allegations in the petition by a preponderance of the evidence and adjudicated Rayna with respect to David pursuant to § 43-247(3)(a). The court found that the allegations of the motion for termination of David's parental rights were not proved by clear and convincing evidence, and the court set forth its reasoning at length. The court also denied the motion requesting that it find that reasonable efforts to preserve and reunify the family are not required.

The State timely filed this appeal.

ASSIGNMENTS OF ERROR

The State asserts, restated, that the juvenile court erred when it found that (1) the State did not meet its burden of proving by clear and convincing evidence that David substantially and continuously or repeatedly neglected Rayna and refused to give her necessary parental care and protection pursuant to Neb. Rev. Stat. § 43-292(2) (Reissue 2008); (2) the State did not meet its burden of proving by clear and convincing evidence that David is not unfit by reason of habitual use of intoxicating liquor or narcotic drugs which is seriously detrimental to Rayna's health, morals, or well-being pursuant to § 43-292(4); and (3) terminating David's parental rights to Rayna is not in Rayna's best interests.

STANDARD OF REVIEW

In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another. *In re Interest of Stacey D. & Shannon D.*, 12 Neb. App. 707, 684 N.W.2d 594 (2004).

ANALYSIS

To terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Stacey D. & Shannon D.*, *supra*. Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *Id.*

We note at the outset, and David readily admits, that his history includes many incidences of violence and extended periods of incarcerations, homelessness, and drug and alcohol use. However, since approximately January 2009, when David learned that Rayna was no longer living with Amanda, David has made an effort to avoid criminal activity, drugs, and alcohol, and has secured employment and a stable home for himself. We turn to an analysis of the statutory factors and best interests determination.

§ 43-292(2).

Section 43-292(2) provides that the court may terminate parental rights when it finds such action to be in the best interests of the juvenile and it appears by the evidence that the parent has substantially and continuously or repeatedly neglected and refused to give the juvenile

or a sibling of the juvenile necessary parental care and protection. The juvenile court found that the State had not proved by clear and convincing evidence that Rayna was within the meaning of § 43-292(2). The court reasoned that until August 2008, Rayna was in the physical care of her mother for all but approximately 3 weeks of her life. In addition, the court noted that David was not served with notice of a juvenile court proceeding in the interest of Rayna until May 5, 2009, both before and after which he had taken steps to establish a parental relationship with Rayna. The court found that since David contacted DHHS upon learning that Rayna was no longer living with Amanda, David's actions have not been neglectful; he secured and moved into an apartment, obtained employment, began to pay back child support owed for another child, and complied with all requests of DHHS to put himself in a position to commence or resume a parental relationship with Rayna.

The State urges us to consider that evidence of a parent's lifestyle, which includes frequent periods of incarceration and a pattern of illegal drug use and dependence, may establish substantial and continuous or repeated neglect under this section. *In re Interest of Joshua M. et al.*, 7 Neb. App. 872, 587 N.W.2d 131 (1998), *reversed in part on other grounds* 256 Neb. 596, 591 N.W.2d 557 (1999). Although incarceration alone is not a basis for termination of parental rights, we may consider that a parent's incarceration has contributed to the neglect of his or her child. See *In re Interest of Kassara M.*, 258 Neb. 90, 601 N.W.2d 917 (1999). Also, one need not have physical possession of a child to demonstrate the existence of the neglect contemplated by § 43-292(2). *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999).

David acknowledges that he has been incarcerated for substantial periods of Rayna's life and that this has contributed to his neglect of her in this case. David has not been incarcerated since September 2008 and has taken steps to abstain from the influences in his life which he admits facilitated his criminal behavior and incarceration, namely drug and alcohol use and maintaining relationships with people who also used these substances. The juvenile court determined that while David failed to ascertain Rayna's whereabouts following his release from prison in September 2008 until January 2009, which was undoubtedly neglectful, a 3- or 4-month period does not rise to the level of substantial and continuous or repeated neglect of a child contemplated within § 43-292(2). We concur with the juvenile court that the State has not proved by clear and convincing evidence grounds for termination pursuant to § 43-292(2).

§ 43-292(4).

Section 43-292(4) requires a finding that the parent is unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the juvenile. The juvenile court acknowledged that David has a troubling history of excessive alcohol and drug use, which resulted in or contributed to his lack of stable employment, frequent incarcerations, and violence toward others. The court found no evidence that David used alcohol or drugs while he was caring for or in the presence of Rayna. David testified that he has abstained from using alcohol or drugs since February 2009, which abstinence was confirmed by the results of random urine analysis testing conducted by DHHS from April through July 2009. The juvenile court concluded that based on the evidence of David's abstinence, his efforts at securing employment and a residence, his lack of incarceration since

September 2008, and the lack of evidence that he has used alcohol or drugs in Rayna's presence, the State had not proved grounds for termination pursuant to § 43-292(4) by clear and convincing evidence.

We note that the child need not be present while the parent commits acts described in § 43-292(4) for the section to apply. *Gomez v. Savage*, 254 Neb. 836, 580 N.W.2d 523 (1998). However, we concur with the court's reasoning that David's abstinence from using drugs and alcohol, efforts at securing employment and a residence, and lack of incarceration since September 2008 are evidence that he is not unfit as contemplated by § 43-292(4). Accordingly, in our de novo review, we conclude that the State has not proved by clear and convincing evidence grounds for termination pursuant to § 43-292(4).

Best Interests Determination.

Even if we were to have found statutory grounds to terminate, we also agree with the juvenile court that it is not in Rayna's best interests to terminate David's parental rights at this time.

Termination of parental rights is permissible in the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code. *In re Interest of Eden K. & Allison L.*, 14 Neb. App. 867, 717 N.W.2d 507 (2006). It is well established that children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *Id.* However, the presumption that the best interests of a child are served by reuniting the child with his or her parent is overcome only when the parent has been proved unfit. *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007). Until the State proves parental unfitness, the child and his or her parents share a vital interest in preventing erroneous termination of their natural relationship. In other words, a court may not properly deprive a parent of the custody of his or her minor child unless the State affirmatively establishes that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right. *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009).

With respect to Rayna's best interests, the juvenile court stated:

[H]aving observed [David's] demeanor while testifying and having considered the essentially uncontroverted evidence that at least since January or February [2009] he is making sincere and significant steps to rehabilitate himself, [the juvenile court] finds that it is in [Rayna's] best interests not to terminate the parental rights of [David] at this time, but rather to afford him the opportunity to establish a parental relationship with [Rayna] and to demonstrate that he is able to provide a safe and stable home for her under a Court-ordered rehabilitation plan.

Upon our de novo review, we agree with the juvenile court that it is not in Rayna's best interests to terminate David's parental rights. For the reasons set forth above, the State has not shown by clear and convincing evidence that David is unfit to parent Rayna. Rather, despite David's history, he has taken steps to put himself in a position to parent Rayna, and we find no error in the juvenile court's determination that it would be in Rayna's best interests to allow him the opportunity to do so.

CONCLUSION

For the foregoing reasons, we conclude that the juvenile court did not err when it found that the State had not proved by clear and convincing evidence that David's parental rights to Rayna should be terminated. Accordingly, we affirm.

AFFIRMED.

SIEVERS, Judge, participating on briefs.